Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FLEMING FOODS OF ALABAMA, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE
STATE OF ALABAMA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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January 13, 1995

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QUESTION PRESENTED

Whether the use tax imposed by Alabama Code § 40-23-61(c) (1975) exacts an unfair tax on interstate commerce by levying an assessment on the full purchase price of trucks and trailers continuously and exclusively used in the interstate transportation of commercial goods without regard to the fact that the majority of the mileage travelled by the vehicles is outside the State of Alabama.

AMENDED DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Effective December 31, 1994, Fleming Foods of Alabama, Inc. merged with Fleming Companies, Inc. Prior to that date, Fleming Foods of Alabama, Inc. was a wholly owned subsidiary of Fleming Companies, Inc. and did not have any subsidiaries.

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v.

DEPARTMENT OF REVENUE
STATE OF ALABAMA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fleming Foods of Alabama, Inc. hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Alabama in this case.

OPINIONS BELOW

The opinion of the Alabama Supreme Court has not yet been released for publication, —— So. 2d —— (Ala. 1994) (1994 WL 503364), and is included in the Appendix at 1a-6a. The Alabama Court of Civil Appeals' opinion has not yet been released for publication and is included in the Appendix at 7a-22a. The Stipulation of Facts entered by the parties before the Circuit Court of Geneva County, Alabama is included in the Appendix at 23a-26a.

JURISDICTION

The decision of the Alabama Supreme Court in this matter was entered on September 16, 1994. On December 6, 1994, Justice Kennedy granted an extension of time to and including January 13, 1995, within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution provides, in pertinent part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

U.S. Const. art. I, § 8, cl. 3.

The United States Constitution also provides, in pertinent part:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

STATEMENT

A. Fleming Foods' Interstate Commerce

Petitioner Fleming Foods of Alabama, Inc. ("Fleming Foods"), formerly a wholly owned subsidiary of Fleming Companies, Inc., an Oklahoma corporation, is engaged in a wide variety of interstate enterprises involving the transportation and distribution of groceries and other commodities to retail grocery stores in the states of Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, and Texas. App. 23a-24a, ¶¶ 1, 6. Petitioner transports these commodities both as an intercorporate hauler under ICC guidelines and as a motor common carrier. App. 24a, ¶ 6.

In order to facilitate the transportation of its cargo in interstate commerce, Fleming Foods' parent company purchased thirteen new 1983 and 1984 Peterbilt trucks and eight new 1983 and 1984 Polar American trailers. The Peterbilt trucks were ordered in Oklahoma and manufactured in Texas. App. 26a, ¶ 14. After Fleming Foods' parent company inspected the trucks, they were shipped FOB Denton, Texas, to Fleming Foods in Geneva, Alabama. *Id.* The Polar American trailers were also manufactured in Texas. App. 25a, ¶ 9. Fleming Foods' parent company took possession of the trailers in Oklahoma and modified them for the company's use. *Id.* The trailers were then turned over to Fleming Foods, which used them to transport commodities in interstate commerce before the trailers were stationed in Alabama. *Id.* ¶ 10. While the trailers are most frequently dispatched from Fleming Foods' facility in Geneva, Alabama, they are often "swapped out" at facilities owned by Fleming Foods' parent company in other states and not used in the State of Alabama or by Fleming Foods. *Id.* ¶ 12. All of the trucks and trailers dispatched from Fleming Foods' facility in Geneva, Alabama, have been used continuously in interstate commerce. App. 25a-26a, ¶¶ 10, 15. In 1984, this fleet travelled 6,143,530 miles, but only 2,341,153 (or 38%) of those miles were travelled within the State of Alabama. App. 25a, ¶ 8.

The trucks and trailers are titled and registered in Utah in the name of Fleming Foods' parent company under the International Registration Plan ("IRP").[1] App. 24a, ¶ 4. Under the IRP, Fleming Foods reports to the State of Utah the number of miles its truck and trailer fleet has travelled. Fleming Foods' registration fees, paid in part for "road use," are then apportioned by Utah based on mileage travelled. Alabama and the various states in which the fleet has travelled then receive their appor-

[1] Alabama's codification of the IRP is found at Ala. Code § 32-6-56 (1975).

tioned share. *Id.* Fleming Foods also reports to the State of Alabama the total number of miles its fleet has travelled in Alabama and all other states in order for the State to assess a quarterly fuel tax.

B. Alabama's Use Tax

Fleming Foods paid no sales tax to Alabama when the trucks and trailers were purchased because the sales occurred outside the State of Alabama. The state in which the vehicles were purchased did not tax the sale of the trucks and trailers either. On January 22, 1985, the State of Alabama attempted to assess a use tax on the trucks and trailers pursuant to Ala. Code § 40-23-61(c) (1975). Section 40-23-61(c) provided for the imposition of a one-and-a-half percent excise tax on the "storage, use or other consumption in this state" of trucks and truck trailers when no sales tax has been paid to the State of Alabama.[2] Notwithstanding the fact that Fleming Foods' trucks and trailers admittedly were used only 38% of the time in Alabama, respondent insisted on assessing its use tax in full on the total purchase price of the vehicles in question, $890,866.

C. Lower Court Proceedings

Fleming Foods responded to the assessment of this use tax on its trucks and trailers by filing a petition for redetermination. That petition was denied and Fleming Foods requested an administrative hearing. On April 1, 1988, an administrative law judge held in favor of respondent and ordered the entry of a final assessment. Petitioner appealed this decision to the Circuit Court of Geneva County. The parties entered into a formal stipulation of facts before the Circuit Court, App. 23a-26a (technically entitled "Proposed Stipulation of Facts"), and presented oral arguments. The Circuit Court entered judgment in favor of respondent.

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[2] Ala. Code § 40-23-61(c) (1975) now provides for a two percent tax.

Petitioner appealed this decision to the Alabama Supreme Court, which transferred jurisdiction to the Alabama Court of Civil Appeals. The Court of Civil Appeals applied the four-pronged test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), to Alabama's use tax. App. 17a-18a. In *Complete Auto* this Court held that a state tax on interstate commerce will survive Commerce Clause scrutiny only if the tax "[1] is applied to an activity with a substantial nexus to the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

In order to determine if the use tax was fairly apportioned, the Court of Civil Appeals applied the internal and external consistency tests delineated in *Goldberg* v. *Sweet*, 488 U.S. 252 (1989). Under this Court's decision in *Goldberg*, "[t]o be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.* at 261. The external consistency test, on the other hand, "asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. Noting that petitioner's fleet of trucks and trailers travelled only 38% of their mileage within Alabama, the Court of Civil Appeals held that Alabama's use tax failed both the internal and external consistency tests and therefore was not fairly apportioned. App. 19a. The Court of Civil Appeals also held that respondent's assessment failed the third prong of the *Complete Auto* test by discriminating against interstate commerce contrary to this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), which disallowed Pennsylvania's unapportioned flat user fee taxes. App. 19a-20a. The Court of Civil Appeals noted that, similar to Alabama's use tax, Pennsylvania's impermissible taxes had "disproportionately burdened interstate trucks which travelled

fewer miles per year on that state's highways." App. 20a. The Court of Civil Appeals reversed respondent's assessment and remanded the matter for an apportioned reassessment of the use tax in accordance with the Commerce Clause. *Id.*[3]

The Alabama Supreme Court granted respondent's petition for review. The court agreed with and adopted respondent's position. The court stated that the use tax was "a one-time tax levied at the same rate as the sales tax" and was "complementary to the sales tax." App. 5a. The Alabama Supreme Court distinguished this "excise tax" from "a tax on revenues generated from carrying on interstate business, like the taxes in *Goldberg v. Sweet.*" *Id.* As a result, the Alabama Supreme Court held: "This is not taxation of interstate commerce" and reversed the Court of Civil Appeals. App. 6a.

D. The *Jefferson Lines* Case Presently Before This Court

On June 13, 1994, this Court granted certiorari in *Oklahoma* v. *Jefferson Lines, Inc., cert. granted,* 114 S. Ct. 2672 (1994) (No. 93-1677). As of the filing of this petition, the case is still pending. The question presented in *Jefferson Lines* is very similar to the question presented by this petition.

In *Jefferson Lines,* the Eighth Circuit held that Oklahoma's sales tax violated the Commerce Clause and this Court's *Complete Auto* test insofar as it applied to bus tickets purchased in Oklahoma for travel outside of the State. *In re Jefferson Lines, Inc.,* 15 F.3d 90 (8th Cir. 1994). Oklahoma argued that its sales tax did not need to be apportioned because it involved a one-time taxable event that occurred not when the transportation service was rendered, but upon the sale of the bus ticket within

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[3] On April 1, 1994, the Court of Civil Appeals modified its opinion by specifying that respondent was to reassess the use tax in an apportioned amount. App. 21a-22a.

Oklahoma. The court of appeals, however, found this characterization "too technical" and held that the sales tax failed the external consistency test. *Id.* at 92. The court relied on this Court's decision in *Central Greyhound Lines, Inc.* v. *Mealey,* 334 U.S. 653 (1948), invalidating an unapportioned state gross-receipts tax on a bus company's revenues generated in part by transportation services provided outside the State. 15 F.3d at 92-93.

In briefing and argument before this Court, the State of Oklahoma contends that its sales tax need not be apportioned according to the miles to be travelled in Oklahoma. The State claims that the court of appeals "mischaracteriz[ed]" the sales tax as a tax "on interstate transportation." Oklahoma Merits Br. 19-20. The State therefore concluded that its sales tax "taxes a single discrete transaction within the State" (*id.* at 21), and thus does not violate the Commerce Clause.

In response, the taxpayer, Jefferson Lines, contends that Oklahoma's sales tax is "indistinguishable" from the tax invalidated by this Court in *Central Greyhound.* Jefferson Lines Merits Br. at 6. Jefferson Lines argues that the sales tax is imposed on interstate commerce (*id.* at 7) and therefore is subject to Commerce Clause scrutiny. *Id.* at 11. It claims the State has "mischaracterize[d] the taxable activity and ignore[d] the practical and economic effect of the tax on interstate commerce" (*id.* at 25), contrary to this Court's opinions that have refused to determine a tax's constitutionality on the basis of its formal label. *Id.* at 28 (citing cases). Because the sales tax is not apportioned according to the miles to be travelled within the State, the sales tax violates the Commerce Clause.

REASON FOR GRANTING THE PETITION

The decision of the Alabama Supreme Court in this case raises a significant constitutional question with respect to the circumstances under which state taxes must be apportioned in order to satisfy the Commerce Clause, as evidenced by this Court's grant of certiorari in *Jefferson Lines.* This fundamental constitutional issue is squarely posed in this case. The State of Alabama readily admits that only 38% of the miles travelled by petitioner's trucks and trailers in twelve states lie within Alabama. Respondent also freely concedes that petitioner's trucks and trailers have been engaged continuously in interstate commerce even when travelling within the State of Alabama. Nevertheless, respondent asserts the right to tax in full the use of these vehicles.

The decision of the Alabama Supreme Court is flatly inconsistent with this Court's decision in *American Trucking Ass'ns* v. *Scheiner,* 483 U.S. 266 (1987), invalidating a substantially equivalent unapportioned flat user fee tax, as well as the extensive line of this Court's cases applying the *Complete Auto* test to state taxes of every ilk. Moreover, in *Scheiner* this Court explicitly rejected the formalistic approach adopted by the Alabama Supreme Court of evaluating taxes only with respect to their labels. The manifest discrimination represented by Alabama's use tax as applied to the instrumentalities of interstate commerce and sanctioned by the Alabama Supreme Court burdens interstate commerce, the free flow of goods by motor common carrier in general, and petitioner's ability freely to transport its goods between destinations in several states.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS REGARDING THE COMMERCE CLAUSE AND SUBSTANTIALLY RAISES THE SAME QUESTION PRESENTED BY *OKLAHOMA* v. *JEFFERSON LINES, INC.*

1. This Court has held that sales taxes and use taxes "are imposed on 'substantially equivalent event[s],' " *Associated Indus.* v. *Lohman,* 114 S. Ct. 1815, 1821 (1994) (quoting *Maryland* v. *Louisiana,* 451 U.S. 725, 759 (1981)), and that " '[a] use tax is generally perceived as a necessary complement to [a] sales tax,' " *id.* (quoting *Williams* v. *Vermont,* 472 U.S. 14, 24 (1985)). The Alabama Supreme Court itself also has acknowledged the complementary nature of sales and use taxes. App. 3a ("the Use Tax Act and the Sales Tax Act are complementary"). To the extent that these taxes are complementary, there is no constitutionally significant difference between the tax imposed on the use of trucks and trailers by the State of Alabama and the tax imposed on the sale of bus tickets by the State of Oklahoma. Moreover, in the case of use taxes, the constitutional implications of taxation on interstate commerce are even clearer because there can be no question that a use tax is imposed on the ultimate use of the vehicles. To the extent that sales and use taxes are constitutionally distinguishable, as the State of Oklahoma has argued in *Jefferson Lines,* this case presents the Court with the opportunity to address in its entirety the question of the validity of imposing unapportioned excise taxes on the instrumentalities of interstate commerce.

Both the State of Alabama and the State of Oklahoma have attempted to evade meaningful review under the Commerce Clause by characterizing their taxes as something other than a tax affecting interstate commerce. Both states claim to levy a one-time tax on an in-state event that is wholly unrelated to the revenue generated by the taxpayers' interstate business. As a result, both states

assert, either explicitly or tacitly, that this Court's apparently conclusive case law is inapposite. Oklahoma disregards *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653 (1948), and Alabama ignores *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987). However, this Court has eschewed the "somewhat metaphysical approach to the Commerce Clause" that focuses on how a tax is characterized "rather than the practical consequences of the tax." *Scheiner*, 483 U.S. at 294-95. This long-standing functional approach was explicitly recognized by this Court when it formulated the four-prong *Complete Auto* test and noted the case law giving rise to the test's various features. 430 U.S. 274, 279 (1977) ("These decisions have considered not the formal language of the tax statute but rather its practical effect") (internal footnote omitted). The applicability of the *Complete Auto* test to sales and use taxes is further evidenced by the fact that *Complete Auto* itself involved the validity of a sales tax. *Id.* at 275.

2. This Court has "steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.' " *Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)). This Court has also stated that "[a]s a general principle, a State may not tax value earned outside its borders." *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). As a consequence, this Court has fashioned the four-prong *Complete Auto* test, discussed *supra* at 5.

The second prong of the *Complete Auto* test requires a state tax to be fairly apportioned in order to pass Commerce Clause scrutiny. In *Goldberg* v. *Sweet*, 488 U.S. 252 (1989), this Court stated that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Id.* at 260-61. One of the factors considered in determining if a state tax is fairly apportioned is whether

the state is taxing only "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. Respondent has stipulated that only 38% of the mileage travelled by the vehicles whose use it seeks to tax is within Alabama. Alabama's unapportioned use tax on the full value of the trucks and trailers is therefore manifestly unfair in violation of the Commerce Clause.[4]

Alabama claims that its use tax is nonetheless permissible because "[no] other state has attempted to impose a sales or use tax upon the vehicles." App. 5a. While multiple taxation is *one* concern of the Commerce Clause, it is not the *exclusive* one. In *ARMCO Inc.* v. *Hardesty*, 467 U.S. 638 (1984), this Court held that "[a] tax that unfairly apportions income from other States is a form of discrimination against interstate commerce. Any other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States." *Id.* at 644-45 (internal citation omitted). This Court specifically noted " '[b]ut that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated.' " *Id.* at 645 n.8 (quoting *Freeman* v. *Hewit*, 329 U.S. 249, 256 (1946)); see also *Central Greyhound*, 334 U.S. at 662-63 ("even if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would not justify the taxing by New York of the entire revenue").

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[4] Respondent cannot justify the use tax on the basis that apportionment would create "insurmountable administrative and technological barriers." *Goldberg* v. *Sweet*, 488 U.S. 252, 264-65 (1989). As noted above, petitioner already reports the mileage its fleet travels both within and without the State of Alabama pursuant to its registration under the IRP and its payment of Alabama's quarterly fuel tax. The basis for administering an apportioned use tax is already present.

For a state tax to survive Commerce Clause scrutiny it also must not discriminate against interstate commerce. *Complete Auto*, 430 U.S. at 279. However, Alabama's use tax, like Pennsylvania's unapportioned flat user fee tax in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), results in prohibited discrimination. Regardless of whether an Alabama trucking enterprise purchases a vehicle in-state and a sales tax is imposed or it purchases a vehicle out-of-state and a use tax is assessed, the tax burden the Alabama trucking enterprise bears for using its fleet exclusively within the state is the same as the tax burden borne by petitioner for an identically priced fleet used only *in part* within the state. As a result, even though the Alabama trucking enterprise and petitioner would pay the same use tax, petitioner's burden would be proportionally higher because it uses its fleet in Alabama to a lesser extent. Alabama's "apparently neutral" use tax has a discriminatory effect when applied to enterprises engaged in interstate commerce and for this reason as well the use tax violates the Commerce Clause. See *id.* at 296.

In sum, the decision of the Alabama Supreme Court upholding Alabama's use tax squarely conflicts with this Court's decisions construing the Commerce Clause. Alabama's use tax is not fairly apportioned and taxes petitioner for the use of its fleet outside the state. Alabama's use tax does not properly reflect the in-state component—38% of total mileage—of the usage taxed by the state. In addition, the use tax has a discriminatory effect because of the disproportionate burden it imposes on interstate trucking enterprises using their fleets only in part within Alabama.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *Oklahoma* v. *Jefferson Lines, Inc., cert. granted,* 114 S. Ct. 2672 (1994) (No. 93-1677), and then disposed of as appropriate in light of the Court's decision in *Jefferson Lines.*

Respectfully submitted,

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January 13, 1995

APPENDICES

APPENDIX A

[Released Sep. 16, 1994]

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1994

1931005, 1931007

EX PARTE FLEMING FOODS OF ALABAMA, INC.

EX PARTE THE DEPARTMENT OF REVENUE,
STATE OF ALABAMA

Petitions for Writ of Certiorari
to the Court of Civil Appeals

(Re: Fleming Foods of Alabama, Inc.

v.

The Department of Revenue, State of Alabama)

(Geneva Circuit Court, CV-88-063)
(Court of Civil Appeals, AV92000300)

SHORES, JUSTICE.

The issue raised by the petitioners is whether the State Department of Revenue legally and correctly assessed use taxes against certain vehicles operated by Fleming Foods of Alabama, Inc. ("Fleming Foods"), pursuant to § 40-23-61(c), Ala. Code 1975.

On January 22, 1985, the Department issued assessments against Fleming Foods for use taxes on vehicles

during the tax period 1981-1984 in the amounts of $15,320.63 for state use tax and $5,106.89 for city use tax. Fleming Foods then petitioned the Department for a redetermination. Its petition was denied, and Fleming Foods then requested a hearing before the Department's Administrative Law Division. After a hearing, the administrative law judge affirmed the assessments. Fleming Foods appealed the assessments to the Circuit Court of Geneva County.

The circuit court considered the case based on a signed stipulation of the parties, the transcript of the administrative hearing, briefs, and oral argument by counsel for the parties. The circuit court held that the assessments were legal and correct and directed the Department to make the assessments final. Fleming Foods filed a motion for a new trial or, in the alternative, a JNOV. That motion was denied, and Fleming Foods appealed to this Court. We transferred the appeal to the Court of Civil Appeals.

The Court of Civil Appeals held that the use tax assessments failed the internal and external consistency tests of the second prong (apportionment) and third prong (discriminates against interstate commerce) of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). The Court of Civil Appeals reversed the judgment and remanded the cause with instructions to reassess the use taxes in an apportioned amount. That court's opinion was subsequently modified to provide that, on remand, the circuit court was to direct the Department to reassess the use taxes against Fleming Foods in an apportioned amount. See *Fleming Foods of Alabama, Inc. v. Department of Revenue,* [Ms. AV92000300, Sept. 3, 1993] —— So.2d —— (Ala. Civ. App. 1993).

Both the Department and Fleming Foods petitioned this Court for certiorari review. The Department contends that the judgment of the Court of Civil Appeals

should be reversed and that the Department's assessment should be reinstated. Fleming Foods argues that the judgment of the Court of Civil Appeals should be affirmed insofar as it holds the assessment invalid under the Commerce Clause of the United States Constitution, but reversed insofar as it interprets § 40-23-62(2) as allowing apportionment of use taxes.

We first acknowledge that the opinion of the Court of Civil Appeals correctly holds that § 40-2-22 (repealed effective October 1, 1992, by Act No. 92-186, Ala. Acts 1992) applies to this case and that the assessments made by the Department are considered to be prima facie correct. We note, as the Court of Civil Appeals acknowledged, that exemptions from taxation are to be strictly construed against the person or party claiming the exemption and in favor of the right to tax. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890, 893-94 (Ala. 1981).

We also acknowledge that the Use Tax Act and the Sales Tax Act are complementary. The use tax serves to equalize the burden of the sales tax and to prevent a person from avoiding the sales tax by purchasing goods outside the state. *State v. Southern Kraft Corp.*, 243 Ala. 223, 8 So.2d 886 (1942); *State v. Toolen*, 277 Ala. 120, 167 So.2d 546 (1964).

The use tax is levied pursuant to § 40-23-61(c), which provides:

> "(c) An excise tax is hereby imposed on the storage, use or other consumption in this state of any automotive vehicle or truck trailer, semitrailer or house trailer, and mobile home set-up materials and supplies including but not limited to steps, blocks, anchoring, cable pipes and any other materials pertaining thereto, purchased at retail on or after October 1, 1965, for storage, use or other con-

> sumption in this state at the rate of two percent [1] of the sales price of such automotive vehicle, truck trailer, semitrailer or house trailer, and mobile home set-up materials and supplies as specified above, or the amount of tax collected by the seller, whichever is greater; provided, however, when the seller follows the Department of Revenue's suggested use tax brackets and his records prove that his following said brackets resulted in a net undercollection of tax for the month, he may report the tax due or tax collected, whichever is less. Where any used automotive vehicle or truck trailer, semitrailer or house trailer is taken in trade, or in a series of trades, as a credit or part payment on the sale of a new or used vehicle, the tax levied herein shall be paid on the net difference, that is, the price of the new or used vehicle sold less the credit for the used vehicle taken in trade."

A use tax, such as § 40-23-61(c) imposes, does not violate the Commerce Clause of the United States Constitution if: "(1) there is a substantial nexus between the activity and the taxing state; (2) the tax is fairly apportioned; (3) the tax is nondiscriminatory; and (4) it is reasonably related to services and protection provided by the taxing state." *Ex parte Dixie Tool & Die Co.*, 537 So.2d 923, 924 (Ala. 1988), citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

The Court of Civil Appeals held that Fleming Foods met the first prong of the *Complete Auto Transit* test (that the activity had a substantial nexus with the State of Alabama) and the last prong (that the tax is reasonably related to services and protection provided by the State of Alabama), but held that the second and third prongs were not met. We disagree.

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[1] The applicable tax rate is one and one-half percent in this case. It was changed to two percent by subsequent amendment.

When the *Complete Auto Transit* test is applied to a state's use tax assessment, it must be understood that a use tax is not a tax on revenues generated from carrying on interstate business, like the taxes in *Goldberg v. Sweet,* 488 U.S. 252 (1989), but is an excise tax imposed upon the privilege of storing, using, or otherwise consuming tangible personal property purchased at retail outside the state and domiciled in the state. The use tax is not a recurring annual tax, but is a one-time tax levied at the same rate as the sales tax and is complementary to the sales tax.

The use tax is described in 68 Am. Jur. 2d, *Sales and Use Tax* § 188 (19—), as neither a property tax nor an ad valorem tax: it is a nonrecurring tax. Also, a use tax is externally consistent because of the credit provided for payment of sales or other use tax:

> "The provision of a *credit* in a use tax statute for sales or use tax paid to another state makes a use tax externally consistent, as much as such a provision avoids actual multiple taxation."

(Emphasis added.)

The use tax imposed in the present case is not imposed upon revenues derived from carrying on an interstate business or interstate commerce, but is intended to prevent one from avoiding the sales tax law.

In this case, it is clear that *no* sales tax was ever paid on these vehicles; there was no evidence of actual multiple taxation; and there was no evidence that any other state has attempted to impose a sales or use tax upon the vehicles. The trucks and trailers were purchased outside Alabama and were brought into Alabama and based at Geneva. If Fleming Foods had purchased the vehicles from an Alabama dealer, sales tax would have been collected under § 40-23-2(4) at the time of the sale. This would have exempted the vehicles from any use tax in Alabama. The use tax of § 40-23-61(c) is a tax equiva-

lent to the sales tax of § 40-23-2(4) and it is levied on those vehicles on which the sales tax has not been paid. This is not taxation of interstate commerce.

The administrative law judge upheld the use tax assessments, based upon *Great American Airways v. Nevada State Tax Comm'n,* —— Nev. ——, 705 P.2d 654 (1985), *cert. denied,* 479 U.S. 87 (1986). However, other cases also support the assessment. See: *Whitcomb v. Commissioner of Taxes,* 144 Vt. 466, 479 A.2d 164 (1984) (use tax imposed on aircraft purchased outside Vermont); *Director of Revenue v. Superior Aircraft Leasing Co.,* 734 S.W.2d 504 (Mo. 1987) (use tax on airplane upheld by Missouri Supreme Court; no sales tax paid in any other state); *Service Merchandise Co. v. Jackson,* 735 S.W.2d 443 (Tenn. 1987) (Tennessee Supreme Court upheld use tax of aircraft hangared in Nashville; no sales or use tax paid in any other state); *H.K. Porter Co. v. Commonwealth,* 111 Pa. Cmwlth. 463, 534 A.2d 169 (1987) (because credit for other taxes was allowed, there was no double taxation); *Archer Daniels Midland Co. v. Department of Revenue,* 170 Ill. App. 3d 1014, 524 N.E.2d 1010 (1988).

For the reasons stated above, the judgment of the Court of Civil Appeals is reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Maddox, Almon, Houston, Steagall, and Ingram, JJ., concur.

APPENDIX B

[Sep. 3, 1993]

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
SPECIAL TERM 1993

AV92000300

FLEMING FOODS OF ALABAMA, INC.

v.

THE DEPARTMENT OF REVENUE,
STATE OF ALABAMA

Appeal from Geneva Circuit Court
(CV-88-063)

YATES, Judge

The Alabama Department of Revenue (Department) assessed use taxes, along with penalties and interest, against Fleming Foods of Alabama, Incorporated (Fleming Foods). Following a ruling by an administrative law judge in favor of the Department, Fleming Foods appealed the assessment to the Circuit Court of Geneva County (trial court). The trial court found that the assessment as to certain vehicles operated by Fleming Foods was legally and constitutionally assessed, that the assessment was correct, and it directed the Department to finalize the assessment. After its motion for new trial was denied, Fleming Foods appealed.

On appeal, Fleming Foods states its issue as follows: "Under the laws of Alabama and the Commerce Clause of the U.S. Constitution, may [the Department] impose a use tax on [Fleming Foods] for the use . . . of trucks and trailers which are instrumentalities of interstate commerce and have been and are continuously in use in interstate commerce."

In stating applicable standards for our review, we first note that Ala. Code 1975, § 40-2-22, pertaining to appeals from final assessments made by the Department, has been repealed by Act No. 92-186, Ala. Acts 1992, and, along with several other code sections, has been replaced by the "Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act," Ala. Code 1975, § 40-2A-1 *et seq.* Section 83 of Act No. 92-186 provides, in most cases, an effective date of October 1, 1992. Based on the facts here, this court is of the opinion that, despite being repealed by Act No. 92-186, the provisions of § 40-2-22 still apply to this particular case. *See Bryson v. Central Electric Co.*, 402 So. 2d 922 (Ala. 1981); *Cf. Wilkinson v. State ex rel. Morgan,* 396 So. 2d 86 (Ala. 1981) (where express repeal of statute operated to dissolve injunction entered pursuant to repealed statute, due to "continuing" nature of injunctions). As such, the assessment made by the Department shall be considered correct prima facie, and the taxpayer, here Fleming Foods, has the burden of proving that the assessment is incorrect. Ala. Code 1975, § 40-2-22.

Also, we acknowledge the well-known rule of construction concerning exemption statutes in taxation:

> " '[E]xemptions from taxation, whether statutory or constitutional, are to be strictly construed, against the exemption and in favor of the right to tax, and . . . no person or property is to be exempted unless the intention to exempt such person or property clearly appears in some statute or constitutional provision.' Furthermore, it has long been the rule

> that one seeking an exemption from taxation assumes the burden to clearly establish the right, and that in all cases of doubt as to legislative intention, the presumption is in favor of the taxing power."

Community Action Agency of Huntsville, Madison County, Inc. v. State, 406 So. 2d 890, 893-94 (Ala. 1981) (citations omitted).

The parties in this case entered a joint stipulation of facts which stated, in pertinent part, the following:

> "1. [Fleming Foods], an Alabama corporation, is a wholly owned subsidiary of Fleming Companies, Inc., an Oklahoma corporation.
>
> "2. The State of Alabama and the City of Geneva have assessed use taxes in the principal amounts of $13,753.61 and $4,584.54 respectively against certain vehicles in question in the possession of Fleming Foods . . . for the period of July 1, 1981 through June 30, 1984. Those vehicles in question are:
>
> "(a) [Omitted]
>
> "(b) Eight 1983 and 1984 Polar American trailers;
>
> "(c) Thirteen 1983 and 1984 Peterbilt trucks.
>
> "3. Fleming Foods . . . acquired the use of the vehicles which were purchased through the parent corporation, Fleming Companies, Inc.
>
> "4. The tractors and trailers are titled and registered in the State of Utah in the name of Fleming Companies, Inc. under the provisions of the International Registration Plan.
>
> "5. The amount of registration fees payable to the State of Alabama pursuant to the IRP has not been affected by the titling and base registration of

the vehicles in Utah rather than Alabama. All registration fees due to the State of Alabama on account of the vehicles have been paid.

"6. Fleming Foods . . . derived revenue during the period in question from:

"(a) the distribution of wholesale groceries from Fleming Companies, Inc., warehouses to various retail grocery stores located in [various southeastern and southwestern states, including Alabama].

"(b) the transportation of commodities from various locations in the above-referenced states to Fleming Companies, Inc.'s wholesale distribution centers as a compensated intercorporate hauler within ICC guidelines and authority therefor.

"(c) the transportation of various commodities between non-Fleming entities in the above-referenced states as a[n] ICC common carrier.

"(d) the wholesale brokering of transportation services for commodities which: (1) do not belong to Fleming Companies, Inc. and which are transported by Fleming Companies, Inc., or (2) which belong to Fleming Companies, Inc., but which are transported by unrelated entities.

"7. The vehicles in question were manufactured and purchased outside of the State of Alabama.

"8. In 1984, the fleet of vehicles comprising Fleming Foods . . . travelled a total of 6,143,530 miles logging 2,341,153 of those miles in the State of Alabama; as such 38% of Fleming Foods total miles were logged in the State of Alabama. . . .

"9. The 1983 and 1984 Polar American trailers were manufactured in Texas. Fleming Companies, Inc. took possession of the trailers in Oklahoma City, Oklahoma whereupon they were inspected by Fleming Companies, Inc. employees, custom modi-

fied for the company's use, and delivered to Fleming Foods . . . in Oklahoma City, Oklahoma.

"10. Before the 1983 and 1984 Polar American trailers first entered the State of Alabama, they had been used to haul commodities in interstate commerce. When they first entered the [S]tate of Alabama they were under load with commodities being transported into and through the state in the course of interstate commerce. The trailers since have been used continuously in interstate commerce in the above described fashion.

"11. [Omitted]

"12. Although the trailers are most frequently dispatched from the Geneva, Alabama facility of Fleming Foods . . . , they frequently are dropped at other Fleming Companies, Inc. facilities in other states. When the trailers are at those facilities, they are used by Fleming Companies, Inc. or its subsidiaries for transportation not related to the specific uses of Fleming Foods . . . . This is referred to within the company as 'swapping out.'

"13. Fleming Foods . . . may not sell or otherwise dispose of the vehicles without the approval of Fleming Companies, Inc.

"14. The 1983 and 1984 Peterbilt trucks were ordered by employees of Fleming Companies, Inc. in Oklahoma City, Oklahoma and were manufactured in Texas. Prior to the purchase and delivery of the initial shipment of the new model trucks, an inspection was conducted by employees of Fleming Companies, Inc. in Texas. After the purchase of the trucks was approved by Fleming Companies, Inc., they were transported FOB Denton, Texas to Geneva, Alabama.

"15. When the 1983 and 1984 Peterbilt trucks first entered the State of Alabama they were not

under load but were not operated until they were placed in the Fleming Companies, Inc. fleet and began operating in the above-referenced states. The vehicles since have been used continuously in interstate commerce as hereinabove described.

"16. Since the time all the vehicles in question entered the State of Alabama they have been used continuously in interstate commerce in the conduct of the business of Fleming Companies, Inc. and Fleming Foods . . . in the above-referenced manner."

In imposing the tax in question, the Department relies on Ala. Code 1975, § 40-23-61(c), which states as follows:

"An excise tax is hereby imposed on the storage, use or other consumption in this state of any automotive vehicle or truck trailer, semitrailer or house trailer purchased at retail on or after October 1, 1965, for storage, use or other consumption in this state at the rate of one and one-half percent of the sales price of such automotive vehicle, truck trailer, semitrailer or house trailer."

An exemption for such tax exists, however, pursuant to Ala. Code 1975, § 40-23-62, as follows:

"The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:

". . .

"(2) Property, the storage, use or other consumption of which this state is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this state."

First, Fleming Foods essentially contends that the Alabama Legislature, in enacting the predecessors to the use

tax provisions utilized here by the Department, did not intend for vehicles in interstate commerce to be assessed a use tax, unless and until those vehicles came to rest within the state to create a "taxable moment." Fleming Foods constructs its contention from an analysis of § 40-23-62(2), and from an analysis of several decisions of the Supreme Court of the United States and of the Alabama Supreme Court. As a result, Fleming Foods argues that its vehicles in question in this case are exempted from Alabama's use tax because, according to Fleming Foods, those vehicles are "instrumentalities of interstate commerce for which there has been no local 'taxable moment' separate from the flow of interstate commerce." Stated differently, Fleming Foods argues that the imposition of the use tax in this instance would be a violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, since, according to Fleming Foods, its vehicles never were removed from the flow of interstate commerce. Accordingly, Fleming Foods claims the exemption stated in § 40-23-62(2).

As argued by Fleming Foods in its brief, the application of a state tax statute, when considered in light of the Commerce Clause, is based on a determination of the legislature's *intention at the time of enactment* of that statute, despite more recent decisions of the Supreme Court of the United States enlarging an area of state taxation. *Ex parte Dixie Tool & Die Co.*, 537 So. 2d 923 (Ala. 1988); *See also, Siegelman v. Chase Manhattan Bank (USA), National Association*, 575 So. 2d 1041 (Ala. 1991) (intention of legislature at time of enactment of statute is key question).

> " '[These] recent pronouncements of the United States Supreme Court which enlarge the permissible area of state taxation cannot change the intent or enlarge the scope of enactments passed by our Legislature. Therefore, the question is not whether the State *may*, under prevailing caselaw, impose a tax upon the gross receipts earned from those transac-

> tions. Rather, the controlling issue is whether, in originally enacting this statute, the Legislature *intended* to tax these transactions. To determine that intent, we must look to the nature of the activity involved as well as the 'history of the times' when the statute was enacted.' "

Dixie Tool, supra, at 925 (emphasis in original) (citation omitted).

The predecessors to § 40-23-61 and § 40-23-62(2) were approved originally on February 28, 1939, by Act No. 67, Ala. Acts 1939, in §§ II(b) and III(b), respectively. These provisions then were codified in Code 1940, tit. 51, § 788(b) and § 789(b), respectively. Since the original enactment, changes to the use tax have come, for the most part, only as to the applicable tax rate and as to the types of vehicles involved. There have been no changes to the exemption provision upon which Fleming Foods relies.

To determine the intent of the Alabama Legislature in enacting the use tax, we turn to a discussion of then-current case law. In *State of Minnesota v. Blasius,* 290 U.S. 1 (1933), the Supreme Court of the United States stated the following:

> "[T]he states may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the state may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The 'crucial question,' in determining whether the state's taxing power may thus be exerted, is that of 'continuity of transit.'

> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it. If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement."

Id. at 9-10 (citations omitted).

Later, in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Supreme Court stated that "[t]hings acquired or transported in interstate commerce may be subjected to a property tax . . . when they have become part of the common mass of property within the state of destination. . . . For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use. . . ." *Id.* at 582 (citations omitted).

Also, less than one month prior to the enactment of Alabama's original use tax provisions, the Supreme Court discussed the "taxable moment" principle, as follows:

> "The principle illustrated by the Helson Case forbids a tax upon commerce or consumption in commerce. The Wallace Case, and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. . . . If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage,' no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on

> storage and use . . . was effective. The interstate movement was complete. The interstate consumption had not begun."

Southern Pac. Co. v. Gallagher, 306 U.S. 167, 176-77 (1939).

In considering these cases, certain presumptions concerning legislative intent are applicable. As noted in *Siegelman, supra,* we presume that our legislature, at the time of enactment of the use tax provisions, was aware of pertinent case law. Also, we presume that the legislature was aware of limits on the state's taxing power. *Id.*

In its brief, Fleming Foods places great reliance on the fact that the original exemption provision remains unchanged. According to Fleming Foods, "[b]ecause the exemption contained in § 40-23-62(2) has remained unchanged from its original enactment, the established rule in Alabama is that the exemption applies today in the same manner that it did when enacted in 1939." Such reliance is misplaced, however.

A literal reading of the exemption provision clearly shows that the exemption applies to property which the state "is prohibited from taxing *under the constitution or laws of the United States* of America or under the constitution of this state." Act No. 67, Ala. Acts 1939 (emphasis added). We note that the language does not limit the exemption to property for which there has been no "taxable moment," nor does it limit the exemption to other situations similar to those in the United States Supreme Court decisions quoted earlier. Our determination of the legislative intent surrounding the exemption provision is that the legislature worded the provision to allow for possible changes in prevailing law concerning the relationship of state tax statutes to, among other things, the Commerce Clause. In other words, the exemption provision, enacted shortly after the cases of *Blasius, supra, Henneford, supra,* and *Southern Pac., su-*

pra, were decided, nevertheless retains flexibility in its wording, so as to provide an exemption from taxation when the laws of the United States or of Alabama so provide. Again we note the presumption that our legislature was aware of these recent U.S. Supreme Court cases, *Siegelman, supra*; yet our legislature chose to word the exemption provision in a manner not solely restricted to "taxable moments." As such, the fact that its wording remains unchanged is of no consequence. Therefore, § 40-23-62(2) does not bar automatically the imposition of a use tax on the vehicles of Fleming Foods.

As acknowledged by the Supreme Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), prior Supreme Court decisions

> "have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Id. at 279.

As noted by the Department in its brief, the components of this four-pronged test did not originate from *Complete Auto Transit, supra,* but simply were consolidated in that case to form its analysis. In fact, one case cited in *Complete Auto Transit, supra, pre-dated* the original enactment of Alabama's use tax provisions and stated the following:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' and the bare fact that one is carrying on interstate commerce does not

> relieve him from many forms of state taxation which add to the cost of his business. . . . [I]f the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the state will be sustained."

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254-55 (1938) (citations omitted). It is the four-pronged test of *Complete Auto Transit, supra,* which must be applied to the facts of this case.

In its brief, Fleming Foods concedes that its business activities have a substantial nexus with the State of Alabama. Fleming Foods argues, however, that the remaining prongs of the *Complete Auto Transit, supra,* test are not met.

In elaborating on the second prong of *Complete Auto Transit, supra,* the Supreme Court of the United States stated the following:

> "[W]e are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. . . . [W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.
>
> *"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.* Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. . . .
>
> ". . . .
>
> *"The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.*

> We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.
>
> ". . . .
>
> "It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry. *In previous cases we have endorsed apportionment formulas based upon the miles a bus, train, or truck traveled within the taxing State.*"

Goldberg v. Sweet, 488 U.S. 252, 260-62, 264 (1989) (emphasis added) (citations omitted).

Based upon the foregoing and based upon the stipulations of the parties, we hold that the use tax assessment, as applied to Fleming Foods' vehicles in this case, fails both the internal and external consistency tests of the second, or apportionment, prong of *Complete Auto Transit, supra.* In paragraph 8 of the parties' stipulations, the parties agree that, in 1984, Fleming Foods' fleet of vehicles travelled only 38% of its mileage within the state of Alabama. The record reflects no apportionment of the use taxes assessed by the Department for the period in question, however. Accordingly, the Department's assessment is not internally consistent since, if every state imposed an identical tax against Fleming Foods, multiple taxation *would* result. *Goldberg, supra.* Also, the assessment fails the external consistency test, in that the Department's assessment, at least for the year 1984, does not "reasonably reflect[] the in-state component of the activity being taxed." *Id.* at 262.

For completeness, we briefly address the third and fourth prongs of *Complete Auto Transit, supra.* For basically the same reasons noted in our evaluation of the second prong of *Complete Auto Transit, supra,* we also hold that the Department's assessment fails the third prong, i.e, the assessment discriminates against interstate commerce. *See, American*

Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) (holding that Pennsylvania's flat taxes discriminated against interstate commerce, because those taxes disproportionately burdened interstate trucks which travelled fewer miles per year on the state's highways). Concerning the fourth prong of *Complete Auto Transit, supra*, we hold that the Department's assessment is fairly related to governmental services provided by the state of Alabama. *See Goldberg, supra.*

Since the Department's assessment of use taxes against Fleming Foods fails the test of *Complete Auto Transit, supra*, the trial court's judgment as to the correctness of that assessment is due to be reversed and the cause remanded. On remand, the use taxes are to be re-assessed in an apportioned amount, according to the facts of this case and according to applicable case law.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Robertson, P.J., and Thigpen, J., concur.

[Apr. 1, 1994]

ALABAMA COURT OF CIVIL APPEALS
OCTOBER TERM, 1993-94

AV92000300

FLEMING FOODS OF ALABAMA, INC.

v.

THE DEPARTMENT OF REVENUE,
STATE OF ALABAMA

Appeal from Geneva Circuit Court

(CV-88-063)

ON APPLICATION FOR REHEARING

YATES, Judge

APPLICATION OVERRULED; OPINION MODIFIED (BY SUBSTITUTION OF MODIFIED PAGE 19).

Robertson, P.J., and Thigpen, J., concur.

Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) (holding that Pennsylvania's flat taxes discriminated against interstate commerce, because those taxes disproportionately burdened interstate trucks which travelled fewer miles per year on that state's highways). Concerning the fourth prong of *Complete Auto Transit, supra*, we hold that the Department's assessment is fairly related to governmental services provided by the State of Alabama. See *Goldberg, supra.*

Since the Department's assessment of use taxes against Fleming Foods fails the test of *Complete Auto Transit, supra*, the trial court's judgment as to the correctness of that assessment is due to be reversed and the cause remanded. On remand, the circuit court is instructed to direct the Department of Revenue to reassess the use taxes in an apportioned amount, according to the facts of this case and according to applicable case law.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Robertson, P.J., and Thigpen, J., concur.

APPENDIX C

IN THE CIRCUIT COURT
OF GENEVA COUNTY, ALABAMA

Case No. CV-88-063M

FLEMING FOODS OF ALABAMA, INC.
an Alabama Corporation,
Appellant/Plaintiff,
vs.

THE DEPARTMENT OF REVENUE,
STATE OF ALABAMA,
Appellee/Defendant.

PROPOSED STIPULATION OF FACTS

Pursuant to agreement between and among the parties hereto, the following facts are stipulated to be true and correct:

1. Fleming Foods of Alabama, Inc., an Alabama corporation, is a wholly owned subsidiary of Fleming Companies, Inc., an Oklahoma corporation.

2. The State of Alabama and the City of Geneva have assessed use taxes in the principal amounts of $13,753.61 and $4,584.54 respectively against certain vehicles in question in the possession of Fleming Foods of Alabama, Inc. for the period of July 1, 1981 through June 30, 1984. Those vehicles in question are:

(a) [not adopted] /i/ JWH 1/2/92

(b) Eight 1983 and 1984 Polar American trailers;

(c) Thirteen 1983 and 1984 Peterbilt trucks.

3. Fleming Foods of Alabama, Inc. acquired the use of the vehicles which were purchased through the parent corporation, Fleming Companies, Inc.

4. The tractors and trailers are titled and registered in the State of Utah in the name of Fleming Companies, Inc. under the provisions of the International Registration Plan.

5. The amount of registration fees payable to the State of Alabama pursuant to the IRP has not been affected by the titling and base registration of the vehicles in Utah rather than Alabama. All registration fees due to the State of Alabama on account of the vehicles have been paid.

6. Fleming Foods of Alabama, Inc. derived revenue during the period in question from:

(a) the distribution of wholesale groceries from Fleming Companies, Inc., warehouses to various retail grocery stores located in Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee and Texas.

(b) the transportation of commodities from various locations in the above-referenced states to Fleming Companies, Inc.'s wholesale distribution centers as a compensated inter-corporate hauler within ICC guidelines and authority therefor.

(c) the transportation of various commodities between non-Fleming entities in the above-referenced states as a ICC common carrier.

(d) the wholesale brokering of transportation services for commodities which: (1) do not belong to Fleming Companies, Inc. and which are transported by Fleming Companies, Inc., or (2) which belong to Fleming Companies, Inc., but which are transported by unrelated entities.

7. The vehicles in question were manufactured and purchased outside of the State of Alabama.

8. In 1984, the fleet of vehicles comprising Fleming Foods of Alabama, Inc. travelled a total of 6,143,530 miles logging 2,341,153 of those miles in the State of Alabama; as such 38% of Fleming Foods of Alabama Inc. total miles were logged in the State of Alabama. (See Exhibit "A" attached hereto "State of Alabama Department of Revenue Interstate Motor Carrier Fuels Tax Return (four quarters)").

9. The 1983 and 1984 Polar American trailers were manufactured in Texas. Fleming Companies, Inc. took possession of the trailers in Oklahoma City, Oklahoma whereupon they were inspected by Fleming Companies, Inc. employees custom modified for the company's use, and delivered to Fleming Foods of Alabama, Inc. in Oklahoma City, Oklahoma.

10. Before the 1983 and 1984 Polar American trailers first entered the State of Alabama, they had been used to haul commodities in interstate commerce. When they first entered the state of Alabama they were under load with commodities being transported into and through the state in the course of interstate commerce. The trailers since have been used continuously in interstate commerce in the above described fashion.

11. [not adopted] /i/ JWH 1/2/92

12. Although the trailers are most frequently dispatched from the Geneva, Alabama facility of Fleming Foods of Alabama, Inc., they frequently are dropped at other Fleming Companies, Inc. facilities in other states. When the trailers are at those facilities, they are used by Fleming Companies, Inc. or its subsidiaries for transportation not related to the specific uses of Fleming Foods of Alabama, Inc. This is referred to within the company as "swapping out."

13. Fleming Foods of Alabama, Inc. may not sell or otherwise dispose of the vehicles without the approval of Fleming Companies, Inc.

14. The 1983 and 1984 Peterbilt trucks were ordered by employees of Fleming Companies, Inc. in Oklahoma City, Oklahoma and were manufactured in Texas. Prior to the purchase and delivery of the initial shipment of the new model trucks, an inspection was conducted by employees of Fleming Companies, Inc. in Texas. After the purchase of the trucks was approved by Fleming Companies, Inc., they were transported FOB Denton, Texas to Geneva, Alabama.

15. When the 1983 and 1984 Peterbilt trucks first entered the State of Alabama they were not under load but were not operated until they were placed in the Fleming Companies, Inc. fleet and began operating in the above-referenced states. The vehicles since have been used continuously in interstate commerce as hereinabove described.

16. Since the time all the vehicles in question entered the State of Alabama they have been used continuously in interstate commerce in the conduct of the business of Fleming Companies, Inc. and Fleming Foods of Alabama, Inc. in the above-referenced manner.

Dated this 18 day of November, 1991.

SNOW, HUTCHISON & NEIDER

/s/ Richard C. Hutchison
RICHARD C. HUTCHISON
Counsel for Fleming Foods of
Alabama, Inc.

Dated this 2nd day of January, 1992.

/s/ J. Wade Hope
J. WADE HOPE
Counsel for Department of
Revenue, State of Alabama